Supreme Court, U.S.
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No.

In the

# Supreme Court of the United States

OCTOBER TERM, 1999

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INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12,
*Petitioner,*

v.

CALMAT CO. and INDUSTRIAL ASPHALT,
*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. The Court of Appeals declared all Local 12's lawful primary strikes illegal based on an offhand remark about multi-employer bargaining, claiming the strikes were motived, in at least significant part, by an illegal objective. Other circuits have concluded that for a strike to be illegal, the illegal motivation must be a substantial objective of the strike. Should the Petition should be granted to resolve a conflict among the circuits regarding the standard under section 8(b)(4)(i)(A) of the National Labor Relations Act for declaring a strike illegal?

2. The Court of Appeals affirmed an award of more than $1 million in damages for security costs based on alleged unlawful secondary activity. The record establishes that little, if any, of the security costs incurred by CalMat were traceable to the alleged unlawful secondary activity but were, in fact, incurred in response to legal, protected primary strike activity. Should the Petition be granted to establish that, to protect a union's right to strike, damages for secondary boycott activity may only be award if there is a causal link between the secondary activity and the purported damages?

3. The Court of Appeals affirmed liability and specific damages awards based on alleged secondary boycott activity when the picketing occurred while CalMat employees were on site. Previous decisions have recognized that such "picketing between the headlights" is protected primary-strike activity. Should the Petition be granted to establish that such ambulatory picketing is not a violation of section 8(b)?

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... vi

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATEMENT ..... 2

A. Local 12 Bargains With Thousands of Individual Employers and Some Multi-Employer Associations. ..... 2

B. Multiple Labor Agreements Between CalMat, Industrial, and Local 12 Expire. ..... 3

C. At a Single Bargaining Session, a Local 12 Representative Mentions CalMat's Withdrawal From the AGC, But No Demand or Suggestion is Ever Made That CalMat Should Rejoin the AGC. . . 3

D. Local 12 Strikes Numerous Employers. ..... 4

E. CalMat Hires An Ohio-Based Security Firm to Protect its California Plants During the Strike But Cannot Link Its Security Costs to Any Alleged Secondary-Boycott Activity. ..... 4

F. The Court of Appeals Determined That Local 12 Engaged in Secondary-Boycott Activity Even When CalMat Personnel Were Present at the Secondary Sites. . . . . 6

G. The Strikes End. . . . . 8

H. The District Court Awards CalMat More Than $2.5 Million in Damages for Alleged Secondary Activity. . . . . 8

I. Almost as an Afterthought, the District Court Finds All the Strikes Were Illegal Because They Were Motivated "In Part" by Local 12's Alleged Desire to Force CalMat to Rejoin the AGC. . . . . 9

REASONS FOR GRANTING THE PETITION . . . . . 9

Point 1: The Petition should be granted to establish that for a strike to be illegal under section 8(b)(4)(i)(A)of the National Labor Relations Act, the illegal motivation must be a substantial objective of the strike. . . . . 11

A. In a Single Paragraph Unsupported by the Record, the Court of Appeals Declares All of Local 12's Strikes Illegal. . . . . 11

B. The Third Circuit Has Established a "Substantial Factor" Test to be used When Applying Section 8(b)(4)(i)(A), Which is Inconsistent With the Ninth Circuit's Decision in This Case. . . . . 12

C. The Court of Appeals' Reliance on Temporal Proximity Departs From This Court's Precedents and Also Creates a Split Among the Circuits. . . . . 14

D. Under the "Substantial Factor" Analysis, the Court of Appeals Would Have Reached a Different Result. . . . . 16

1. It is Undisputed That Local 12 Had Many Legitimate Reasons for its Strikes Against CalMat. . . . . 16

2. The Ninth Circuit Creates a Dangerous Precedent By Allowing a Court to Declare an Entire Strike Illegal Based on One Stray Remark About an Entirely Unrelated Multi-Employer Association. . . . . 17

Point 2: The Petition should be granted to establish that, to protect a union's right to strike, damages for secondary-boycott activity may only be award if there is a causal link between the secondary activity and the purported damages. . . . . 19

A. There is Nothing in the Record to Establish a Causal Link Between Alleged Secondary Activity and the Security Costs CalMat Incurred to Protect its Own Plants. . . . . 20

B. The Court of Appeals Created a Dangerous Precedent By Awarding Damages Based on Secondary Activity When There is no Causal Link to Such Activity. . . . . 21

Point 3: The Petition should be granted to establish that ambulatory "picketing between the headlights" is protected primary strike activity and not a violation of section 8(b). . . . . 22

CONCLUSION . . . . . 25

## TABLE OF AUTHORITIES

### CASES

*Edwards v. City of Houston*,
78 F.2d 983 (5th Cir. 1996) ..... 10

*Electrical Workers, Local 761 v. NLRB*,
366 U.S. 667 (1961) ..... 14

*Feather v. United Mine Workers*,
711 F.2d 530 (3d Cir. 1983) ..... 12, 13

*Feather v. United Mine Workers*,
903 F.2d 961 (3d Cir. 1990). ..... 13, 22

*Flame Coal v. United Mine Workers*,
303 F.2d 38 (6th Cir. 1962) ..... 21

*Frito-Lay, Inc. v. Local Union No. 137*,
623 F.2d 1354 (9th Cir. 1980) ..... 12

*N.L.R.B. v. Carpenters District Council*,
383 F.2d 89 (8th Cir. 1967) ..... 23

*National Woodwork Manuf. Association v. NLRB*,
386 U.S. 612 (1967) ..... 14

*Retail Clerks, Local 770 v. NLRB*,
296 F.2d 368 (D.C. Cir. 1961) ..... 14, 15

*Teamsters Local 807 (Schultz Refrigerated Service)*,
87 N.L.R.B. 502 (1949) ..... 23

*Teamsters Local Union 20 v. Morton*,
377 U.S. 252 (1964) ..... 11

*Truck Drivers Local 728 (Brown Transport Corp.)*,
144 N.L.R.B. 590 (1963) ..... 22

*United Mine Workers v. Gibbs*,
383 U.S. 715 (1966) ..... 11

**STATUTES**

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 1291 ..... 1

28 U.S.C. § 1331 ..... 1

29 U.S.C. § 187 ..... 1

29 U.S.C. § 158(b) ..... passim

## OPINIONS BELOW

The opinion of the court of appeals (App. *infra*, A49) is unreported but may be found at 2000 WL 219746. The findings of fact and conclusions of law of the district court (App. *infra*, A1) are unreported.

## JURISDICTION

Respondents CalMat Co. ("CalMat") and Industrial Asphalt ("Industrial"), a separate legal entity owned by CalMat, each brought separate claims against Petitioner International Union of Operating Engineers, Local Union No. 12 ("Local 12") pursuant to Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, for alleged unfair labor practices as defined in Section 8(b)(4) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 158(b)(4). CalMat also asserted pendent claims under California law.

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331, as it is a civil action arising under the Constitution and laws of the United States, and pursuant to 29 U.S.C. § 187. The United States Court of Appeals for the Ninth Circuit had jurisdiction to hear the appeal from the District Court's final judgment pursuant to 28 U.S.C. § 1291. The Court of Appeals entered an order denying the Petition for Rehearing and Suggestion for Rehearing En Banc on April 14, 2000 (App. *infra*, A54). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed under Supreme Court Rule 13(3).

## STATEMENT

This case involves important questions of law under the National Labor Relations Act. The Court of Appeals affirmed a crippling damages award against Local 12, punishing the union for engaging in a legal strike against CalMat by altering the standards of proof to be applied under section 8(b) of the Act. By punishing Local 12 for legitimate primary strike activity, forcing Local 12 to pay for more than $1 million in security costs the employer voluntarily incurred in response to legal primary strike activity, and doing away with any requirement of demonstrating causation between illegal activity and alleged damages, the Court of Appeals effectively repealed sections of the Act protecting the right to strike.

### A. Local 12 Bargains With Thousands of Individual Employers and Some Multi-Employer Associations.

Local 12 represents employees working in construction and other related industries over a large geographic area in southern California and southern Nevada. (R.E. 311-13, 467).[1] Local 12 has agreements with over eight thousand employers, and approximately five hundred of them are members of multi-employer bargaining associations covered by various Master Labor Agreements ("MLA's"). Among these multi-employer bargaining associations is the Associated General Contractors ("AGC"). The AGC MLA covers job site work including asphalt laydown crews. CalMat was originally a member of the

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[1] Citations to "R.E." are to the Record Excerpts filed by Local 12 with the Court of Appeals.

AGC but withdrew its bargaining authority from the AGC. (R.E. 99, 103).

### B. Multiple Labor Agreements Between CalMat, Industrial, and Local 12 Expire.

In September of 1994, the rock, sand, and gravel agreement between Local 12 and CalMat (as well as with other major employers in the industry) expired without renewal despite bargaining between the parties. (R.E. 97-98). Local 12 agreements with the Permanent Asphalt Plant Employers Association ("PAPEA"), AGC, SCCA, ECA and three other multi-employer associations also expired without renewal despite bargaining. (R.E. 311-15, 468). Industrial withdrew its bargaining authority from the AGC for its laydown crew work and from PAPEA for its hot plant work, and PAPEA dissolved. (R.E. 99, 103).

### C. At a Single Bargaining Session, a Local 12 Representative Mentions CalMat's Withdrawal From the AGC, But No Demand or Suggestion is Ever Made That CalMat Should Rejoin the AGC.

As a result of these numerous labor disputes, there was an unprecedented level of primary strike activity going on in the summer of 1995. (R.E. 92-92). Negotiations between the parties continued, and at an unidentified negotiation session, according to CalMat executive Mason Dickerson ("Dickerson"), William C. Waggoner ("Waggoner"), Local 12's Business Manager, allegedly accused Industrial of instigating the breakup of PAPEA. (R.E. 100-01).

With respect to the AGC, Dickerson stated that Waggoner "just expressed his displeasure with" Industrial's withdrawal from the AGC. (R.E. 101-02). Waggoner did not confirm either of these statements, but noted it was not always in Local 12's best interests to bargain through multi-employer groups. (R.E. 208-09). It is undisputed that no one from Local 12 ever demanded or even suggested that CalMat should rejoin the AGC.

**D. Local 12 Strikes Numerous Employers.**

Local 12's strikes against CalMat, Industrial, and numerous other employers began on July 25, 1995 (R.E. 468), and Local 12 began primary picketing of CalMat and Industrial facilities. Local 12 was also striking and/or picketing other major employers in the rock, sand, and gravel industry, certain other short form asphalt producers, as well as other construction employers, virtually all of whom are the so-called "customers" CalMat and Industrial claim they lost due to purported secondary activity. (R.E. 323-23).

**E. CalMat Hires An Ohio-Based Security Firm to Protect its California Plants During the Strike But Cannot Link Its Security Costs to Any Alleged Secondary-Boycott Activity.**

Before the strike began, and long before any alleged secondary-boycott activity occurred, CalMat speculated that difficulties might arise in connection with a possible primary strike. (R.E. 477). Based on this speculation, and in keeping with its long-standing pre-strike plans, (R.E. 87-90, 186-88, 232-33, 309), CalMat retained an Ohio security firm for the duration of the strike (R.E. 24-38, 262). CalMat flew in numerous security personnel, put them up in hotel rooms, and

rented them cars for a number of months. (R.E. 445). CalMat set up an operations center, created something it called a "Response Team" to deal with purported security concerns relating to the strike (R.E. 246), and spent more than $2 million dollars on its chosen out-of-state private security force. (R.E. 232, 236, 445). CalMat, in contrast, spent nothing on seeking injunctive relief from any court related to any primary picketing and withdraw its injunction request to the N.L.R.B. regarding secondary activity.

At no time during the trial did CalMat link the security costs it voluntarily incurred to even one of the incidents of alleged secondary activity for which it recovered damages. CalMat's single witness on security costs could not identify any specific security incidents related to Local 12's alleged secondary activity as described by the Court of Appeals. (R.E. 261). Brian Gilliam ("Gilliam"), a regional financial analyst for CalMat, made no effort to segregate incidents allegedly arising out of secondary activity from alleged primary incidents directed at CalMat and its employees in his damage calculation. (R.E. 259-60). Nevertheless, although Gilliam testified that the security personnel spent a *de minimus* amount of their time (less than 5%) dealing with secondary issues as a whole (none of which Gilliam could identify specifically) (R.E. 305-06), the Court of Appeals affirmed the District Court's award of approximately half of the total security costs, $1,417,054.00, as damages for alleged secondary activity. (R.E. 484; App. *infra*, A52-53.)

### F. The Court of Appeals Determined That Local 12 Engaged in Secondary-Boycott Activity Even When CalMat Personnel Were Present at the Secondary Sites.

CalMat alleged that, in addition to the lawful, primary picketing of its facilities and activities and those of Industrial, Local 12 engaged in illegal secondary activity by targeting their customers. (R.E. 43-44). The Court of Appeals affirmed damages awards for specific claims of lost profits made by CalMat. (App. *infra* A50-52.)

All these awards were affirmed despite the fact that , at many of the sites of purported "secondary" activity, CalMat personnel were present at or near the time the picketing occurred, or Local 12 had other legitimate disputes with the alleged "secondary" employers.[2] For example:

- With respect to the R-Help award, a Local 12 representative testified without rebuttal that R-Help was using ready mix concrete which was being delivered

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[2] Local 12 disputes the legitimacy of all the damages awards for alleged secondary-boycott activity. Many of the awards relied on inadmissible hearsay testimony and were inconsistent with the evidence introduced at trial. The Court of Appeals also ignored evidence that, due to the primary strike, CalMat was unable to produce some of the asphalt for which it claimed lost profits damages due to secondary activity. (R.E. 125-26)

to the site in CalMat trucks driven by CalMat employees, and that any picketing was lawful, primary picketing directed at CalMat, not R-Help. (R.E. 360-61).

- The Court of Appeals discounted the undisputed fact that CalMat was supplying ready mix to customers like Burhoe using CalMat trucks and CalMat employees, thus creating the probability of lawful primary activity at Burhoe's job site. (R.E. 179)

- R & H Paving ("R&H"), a Local 12 contractor in Ventura, had one of its job sites picketed, and a Local 12 representative testified without rebuttal that if there was picketing, it was lawful primary picketing only while CalMat ready mix was being hauled to the site by CalMat employees. (R.E. 181-84).

- Local 12 began picketing the Garcia job site because Garcia, a short form contractor, failed to follow Local 12's dispatch procedures, and when that dispute was resolved, the picketing stopped. (R.E. 201-02, 399-401).

In the face of these facts demonstrating that Local 12 was engaged in protected, primary strike activity, the Court of Appeals nevertheless affirmed $1,168,246.61 in damages for lost profits due solely to alleged secondary-boycott activity. (App. *infra*, A52-53.)

### G. The Strikes End.

By late September 1995, Local 12 reached an agreement with SCCA and ECA, but could not reach an agreement with

the AGC. The strike, therefore, continued against selected AGC members. The dispute with the AGC finally settled in November of 1995. On November 30, 1995, Local 12 ended virtually all picketing against CalMat and Industrial. (R.E. 367).

In December of 1995, Industrial decided to rejoin the AGC. As Local 12 already reached an agreement with the AGC, this brought an end to the laydown crew strike. (R.E. 321). Local 12 was later decertified as exclusive representative of the former Industrial hot plant employees (R.E. 321). The final labor dispute involving rock, sand, and gravel plant employees ended in July of 1997. (R.E. 321).

### H. The District Court Awards CalMat More Than $2.5 Million in Damages for Alleged Secondary Activity.

Local 12 appealed the District Court's judgment in favor of CalMat and Industrial finding Local 12 liable for unlawful labor practices in connection with three separate strikes against CalMat and Industrial. The District Court awarded $1,168,246.61 in lost profits and the greater sum of $1,417,054 in security costs, linking both awards to Local 12's alleged secondary activity.

### I. Almost as an Afterthought, the District Court Finds All the Strikes Were Illegal Because They Were Motivated "In Part" by Local 12's Alleged Desire to Force CalMat to Rejoin the AGC.

The issue of Local 12's alleged illegal motivation to strike had been the subject of little discussion at trial. Only two witnesses were even asked about CalMat and the AGC, and, in a trial transcript over more than 2000 pages, testimony

regarding the issue can be found on only four pages. (R.E. 101-02; 208-09.) Nevertheless, the District Court, relying on the single mention of AGC by Waggoner at one bargaining session declared that Local 12's strikes were motivated "in part" by a desire to force CalMat to return its bargaining authority for the laydown crews to the AGC, which made all Local 12's strikes illegal under section 8(b)(4)(i)(A) of the National Labor Relations Act. (App. *infra*, A43.)

The Court of Appeals affirmed on all issues in a brief opinion, and Local 12's Petition for Rehearing and Rehearing in banc was denied. (App. *infra*, A49-55.)

## REASONS FOR GRANTING THE PETITION

While purporting to be a simple award of damages for alleged secondary-boycott activity, the Court of Appeals' decision is actually a radical departure from this Court's precedents protecting the right to strike. It creates a significant split among the circuit courts and severely infringes on union rights. In its decision,

- the Court of Appeals broke with decisions from other courts and its own prior decisions by finding that all Local 12's primary strike activity was illegally motivated by Local 12's alleged goal of having CalMat rejoin the AGC, even though there was no testimony that forcing CalMat to rejoin the AGC was even a goal of Local 12. (App. *infra*, A49-50.)

- The Court of Appeals departed from precedent in other circuit courts and ignored basic principles of causation by awarding more than $1 million in damages for security costs based on alleged unlawful secondary

activity when little, if any, of the security costs were traceable to the alleged unlawful secondary activity. (App. *infra*, A52-53.)

- The Court of Appeals ignored decisions in other Courts and this Court's prior determinations by severely curtailing a union's ability to conduct ambulatory picketing at secondary sites when employees of the primary strike target are present. (App. *infra*, A51-52.)

While the Court of Appeals' decision is officially unpublished, this decision radically circumscribing a union's right to strike has precedential value. *See, e.g., Edwards v. City of Houston*, 78 F.2d 983, 1002 n.2 (5th Cir. 1996) (citing unpublished District of Columbia circuit decision as persuasive authority). This decision is particularly significant given the paucity of case law interpreting section 8(b)(4)(i)(A) of the National Labor Relations Act. The Court of Appeals' decision creates a split among the circuits regarding the proper standard to be applied under that section, and also limits union rights in many other ways. The Petition should be granted to heal the splits among the circuit courts and restore the appropriate level of protection for a union's right to strike.

## Point 1:

**The Petition should be granted to establish that for a strike to be illegal under section 8(b)(4)(i)(A)of the National Labor Relations Act, the illegal motivation must be a substantial objective of the strike.**

This Court has long held that, in order to preserve a union's right to strike, a union may only be held liable for damages occasioned by strikes that are motivated by unlawful purposes. *United Mine Workers v. Gibbs*, 383 U.S. 715, 729 (1966); *Teamsters Local Union 20 v. Morton*, 377 U.S. 252 (1964). Section 8(b)(4)(i)(A) prohibits a strike whose objective is forcing an employer to join a multi-employer bargaining organization. In applying this section, the Ninth Circuit severely restricted a union's right to strike, creating a split among the circuits regarding the proper standard to be applied when declaring a primary strike illegal. The Petition must be granted to heal that split and establish what standard must be applied in determining whether a union's strike is illegal because it has an improper purpose.

### A. In a Single Paragraph Unsupported by the Record, the Court of Appeals Declares All of Local 12's Strikes Illegal.

At trial, the issue of Local 12's motivation was barely discussed, yet the District Court finding that the strikes were motivated "in part" by an illegal objective became an independent basis for all of the damages award. (App. *infra*, A43.) The Court of Appeals also gave short shrift to this finding, devoting a single paragraph of its opinion to its conclusion that all of Local 12's strike activity was illegally motivated. In its decision, the Court of Appeals stated that:

> The record supports the conclusion that Local 12's strikes were motivated, at least in significant part, to cause CalMat to rejoin the Associated General Contractors ("AGC"). Given the temporal proximity of CalMat's rejoining the AGC to the end of the strike and testimony establishing Local 12's displeasure with CalMat's decision due to the effect it had on the Permanent Asphalt Plant Employers Association, we affirm the district court's findings under *Frito-Lay, Inc. v. Local Union No. 137*, 623 F.2d 1354, 1360 (9th Cir. 1980)

(App. *infra*, A 49-50.) This short statement creates a split among the circuits and establishes a new, much lower standard for declaring a union's strike illegal.

Even the Ninth Circuit's conclusion that the strikes were motivated "at least in significant part" is not supported by the record. The District Court made no such determination. In its conclusions of law, the District Court stated only that the strike "was intended, in part, to cause CalMat to rejoin the AGC." (App. *infra*, A43.) The Court of Appeals did not explain its basis for altering the District Court's finding, and the premises offered in support of its conclusion are unsupportable, given the applicable precedent.

### B. The Third Circuit Has Established a "Substantial Factor" Test to be used When Applying Section 8(b)(4)(i)(A), Which is Inconsistent With the Ninth Circuit's Decision in This Case.

The Third Circuit has adopted a substantial factor test in analyzing illegal motivation cases. In *Feather v. United Mine*

*Workers*, 711 F.2d 530 (3d Cir. 1983), the court explained that the mere fact that a union sought an illegal aim was insufficient in and of itself to justify an award of damages unless that illegal objective was a "substantial factor" in bringing about the strike. *Feather*, 711 F.2d at 538. The Third Circuit concluded that a strike would not be considered illegal when the union's lawful objectives, by themselves, would have caused the strike but the alleged unlawful objective, by itself, would not have caused the strike. *Feather*, 711 F.2d at 538 n.8. In a subsequent related case, the Third Circuit also noted that any alleged illegal demands must be considered in the context of the bargaining that surrounds it. *Feather v. United Mine Workers*, 903 F.2d 961, 966 (3d Cir. 1990). This difficult standard is necessary to prevent precisely what occurred in this case – a minor motivation, if even a motivation at all, being used by an employer to declare entire strikes illegal.

The Court of Appeals' decision in this case, which is the Ninth Circuit's most recent pronouncement on this issue, is completely inconsistent with the Third Circuit's position. Under the Court of Appeals' formulation in this case, an alleged illegal motivation need not be a substantial motivating factor in the decision to strike. There is no requirement that the illegal motivation, on its own, would have led to the strike. Instead, the Court of Appeals' affirmed the District Court determination that it was sufficient that the alleged illegal objective was "in part" a motivation for the strike. Even the revised formulation made by the Court of Appeals, without explanation, that the desire to have Calmat rejoin the AGC "was, at least in significant part" a cause of the strike is a fear weaker standard than the substantial factor analysis used by the Third Circuit. The Petition should be granted to heal this split and establish the proper standard to be used in applying section 8(b)(4)(i)(A).

### C. The Court of Appeals' Reliance on Temporal Proximity Departs From This Court's Precedents and Also Creates a Split Among the Circuits.

In support of its formulation that all three of Local 12's strikes were motivated "in significant part" to cause CalMat to rejoin the AGC, the Ninth Circuit relied on the "temporal proximity" of the end of the strike and CalMat's decision to rejoin the AGC. (App. *infra*, A49.) Specifically, the Court of Appeals relied on the fact that Local 12 laydown crews returned to work after Industrial again delegated its bargaining authority to the AGC as evidence that forcing Industrial to rejoin the AGC was an objective of the strike. (App. *infra*, A 49.) This also creates a split of authority with decisions in other circuits and is inconsistent with this Court's precedents.

This Court's precedents make it clear that, in determining whether a strike is motivated by an illegal purpose, a court should hesitate to infer a substantial illegal object based on nothing more than the union's conduct and its effects. *Cf. Electrical Workers, Local 761 v. NLRB*, 366 U.S. 667, 673-74 (1961) (picketing that induces secondary employees to respect the union's picket line held not to be equivalent to picketing whose object is to induce those employees to engage in concerted conduct against employer to force employer to refuse to deal with struck employer); *National Woodwork Manuf. Ass'n v. NLRB*, 386 U.S. 612 (1967).

The Ninth Circuit's reliance on this alleged "temporal proximity" also creates a split among the circuits. In *Retail Clerks, Local 770 v. NLRB*, 296 F.2d 368 (D.C. Cir. 1961), the court found that the ultimate return of an employer to a multi-employer association does not in and of itself establish that the strike was improper under 8(b)(4)(i)(A). *Retail Clerks*, 296

F.2d at 373075. The D.C. Circuit required substantial additional evidence to reach that conclusion. *Id.* The Petition should be granted to heal this split and establish the proper evidentiary standards to be applied.

The result in this case demonstrates the need to establish that temporary proximity on its own cannot be a basis for finding illegal motivation. Local 12 had an ongoing dispute with the AGC, and that dispute did not settle until November of 1995. (R.E. 367.) In December of 1995, Industrial (by then CalMat) unilaterally decided to join the AGC, and the laydown crew strike then ended because CalMat became a party to the AGC contract (which had a no strike clause) already in effect. (R.E. 321.)

By joining the AGC, CalMat did not end all the labor disputes – the strike by asphalt plant workers was resolved after Local 12 was decertified as their exclusive representative, and the rock, sand, and gravel plant did not end for another eighteen months. (R.E. 321) Any "temporal proximity" was created by CalMat itself, and is not related to or probative of whether forcing CalMat to join the AGC was a significant motivation for Local 12's strikes. Indeed, other labor disputes, including disputes involving CalMat's hot plant workers and rock, sand, and gravel plant employees, continued after CalMat joined the AGC. (R.E. 321.) By using the temporal-proximity standard, the Court of Appeals misapprehended the reality of the multiple labor disputes between the parties. Granting the Petition would not only heal the split among the circuits but also prevent future use of the temporal-proximity analysis.

### D. Under the "Substantial Factor" Analysis, the Court of Appeals Would Have Reached a Different Result.

Had the Court of Appeals applied the proper analysis mandated by this Court's decisions and consistent with the Third Circuit and earlier Ninth Circuit precedent, the result in this case would have been different, and Local 12's right to strike would have been protected.

There is nothing in the record, nothing cited by the District Court, and nothing cited by the Court of Appeals even suggesting that Local 12 ever demanded or even suggested that CalMat rejoin the AGC as a prerequisite for ending the strike. It is undisputed that Local 12 had numerous, legitimate motivations for its strikes, resulting from long-standing disputes with CalMat and Industrial. To uphold the District Court findings, the Court of Appeals' relied on a remark about an unrelated multi-employer association and the fact that one bargaining unit's strike ended when CalMat rejoined the AGC. The reference to the PAPEA has no relationship to CalMat and the AGC, and the Court of Appeals' reliance on it make no sense. By relying on one strike ending when CalMat rejoined the AGC, the Court of Appeals has created a split with other circuits and defied this Court's precedents.

#### 1. It is Undisputed That Local 12 Had Many Legitimate Reasons for its Strikes Against CalMat.

At trial, CalMat did not challenge Local 12's assertion, supported by the ALJ's findings in adjudicating Local 12's unfair labor practices charge, that Local 12 had numerous, entirely lawful reasons to strike. (R.E. 402). The ALJ determined that

CalMat had committed unfair labor practices under Sections 8(a)(1) and (5). In the May 23, 1997 order, the ALJ found CalMat violated those provisions by failing to provide Local 12 with requested information and by implementing its final offers lowering wages and benefits before negotiations reached an impasse. The strike occurred after these offers were implemented, and the ALJ determined that the "members unanimous approval of the strike which began on or about July 26 was based in part over the implemented cuts in pay and benefits." (R.E. 438). In marked contrast to the District Court's weak causation determinations, the ALJ stated "there is a causal relationship between [CalMat's] unfair labor practices and the strike." (R.E. 439).

2. The Ninth Circuit Creates a Dangerous Precedent By Allowing a Court to Declare an Entire Strike Illegal Based on One Stray Remark About an Entirely Unrelated Multi-Employer Association.

The Ninth Circuit's view of the record with respect to this issue is perplexing. The Court of Appeals relied on testimony allegedly establishing "Local 12's displeasure with CalMat's decision due to the effect it had on the Permanent Asphalt Plant Employers Association . . .," which, of course, is not the AGC. (App. *infra*, A49-50.) In addition to being nonsensical, this statement also has no support in the record. Industrial's "decision" to leave the PAPEA and the effect of that decision on the PAPEA had nothing to do with the AGC. The two multi-employer bargaining associations deal with completely different groups of workers and had separate, unrelated contracts. Industrial leaving the PAPEA did not affect its involvement in the AGC. Local 12's opinion regarding Industrial leaving the PAPEA is not probative of or even

relevant to any desire on Local 12's part to have CalMat join or not join the AGC.

The Court of Appeals' reference to testimony about Local 12's alleged belief that CalMat broke up the PAPEA cannot be construed as in any way supporting its conclusion regarding Local 12 and the AGC. The AGC did not break up, and there were no allegations that CalMat's withdrawal threatened the existence of the AGC. Indeed, the AGC separately reached a labor agreement with Local 12, and CalMat ended the strike of the asphalt laydown crews by joining the AGC after the contract was negotiated. (R.E. 321.) The dispute with the hot plant workers, who were formerly covered by the PAPEA agreement, ended later when Local 12 was decertified as the bargaining agent. CalMat joining the AGC had nothing to do with ending that strike. (R.E. 321.)

This decision is a dangerous precedent – the Court of Appeals has approved a determination that evidence of displeasure with an unrelated event is a basis for finding that three separate strikes lasting many months and ending at different times for different reasons were all motivated by an illegal purpose. The potential effects of such a precedent are devastating. Unions could find themselves unwittingly violating federal labor laws based on offhand remarks or actions over which they have no control. Union bargaining efforts may be chilled for fear that even expressing a wish that an employer consider multi-employer bargaining units would be construed as an effort to "force" an employer into multi-employer bargaining. The Petition must be granted to prevent future use of this radical precedent as a basis for restricting a union's right to strike for legitimate reasons.

## Point 2:

**The Petition should be granted to establish that, to protect a union's right to strike, damages for secondary-boycott activity may only be award if there is a causal link between the secondary activity and the purported damages.**

The Petition should be granted because the Court of Appeals' decision awarding more than $1 million in security costs based on alleged secondary activity creates a split among the circuits, is inconsistent with this Court's precedents, and significantly impairs union rights. The Court of Appeals' award was based on "the number of sites affected by the unlawful secondary activity, the type of assistance required, and the duration of time over which the incidents occurred." (App. *infra*, A 52.) This award is clearly predicated on the theory that the security costs were incurred because of Local 12's alleged unlawful **secondary** activity. But the Court of Appeals made this award without making the necessary link between that purported secondary activity and the security costs incurred by CalMat.

By ignoring the causation requirement, the Court of Appeals has exposed unions to untold liability at the whim of struck employers. CalMat's own witnesses established that almost all the security costs were incurred as a result of primary strike activity. Normally, an employer cannot recover the costs of taking a legal strike. Under this new precedent, however, if there is any secondary activity, a union may be liable for all the additional costs incurred by an employer to take a strike. The Court of Appeals also did not require CalMat to even attempt to mitigate its security costs by seeking injunctive relief or otherwise trying to limit allegedly-disruptive union activity.

CalMat freely chose to rack up a huge bill for "security," CalMat did nothing to mitigate those security costs, and the Court of Appeals let CalMat hand Local 12 the bill. This precedent infringes on and chills a union's right to strike and its ability to represent its members by exposing unions to huge, unforeseeable damage awards.

### A. There is Nothing in the Record to Establish a Causal Link Between Alleged Secondary Activity and the Security Costs CalMat Incurred to Protect its Own Plants.

CalMat's own evidence at trial established that almost all the security costs for which it received an award were in fact incurred in connection with, and as a result of, primary strike activity, not the secondary activity for which the Court of Appeals affirmed the lost profits awards. CalMat admitted it hired an out-of-state security firm because it anticipated potentially violent strike activity **at its own plants**. (R.E. 477, 235.)

There is nothing in the record to support the Court of Appeals' statement that security costs were incurred because of "the type of assistance required" due to secondary activity and "the duration of time over which the incidents" of secondary activity occurred. (App. *infra*, A52.) CalMat's only witness on security costs estimated that less than five percent of the security "response team's" time was actually spent at secondary sites. Indeed, he was unable to remember any specific details of a response team being dispatched to any job site. CalMat was unable to identify a single incident where illegal secondary activity for which CalMat was making a lost profits claim caused the dispatching of a response team. (R.E. 306, 302-08.)

Because CalMat purportedly knew what job sites its asphalt was being delivered to every day of the strike, CalMat could have dispatched security personnel to accompany the trucks if there were indeed a security threat to CalMat or its customers presented by secondary activity. There is no evidence in the record that CalMat ever did that, and the reason is obvious – CalMat's decision to incur additional security costs was motivated by its desire to protect its own plants, not by secondary activity.

### B. The Court of Appeals Created a Dangerous Precedent By Awarding Damages Based on Secondary Activity When There is no Causal Link to Such Activity.

The Court of Appeals' decision exposes unions to a new danger of liability -- liability based solely on the actions of a primary employer and its decision to incur extraordinary expenses in speculative anticipation of lawful union activity. In its decision, the Court of Appeals relied on its earlier decision in *Frito-Lay* to support the award. The Court of Appeals also cited the Sixth Circuit decision in *Flame Coal v. United Mine Workers*, 303 F.2d 38, 46 (6th Cir. 1962). While both *Frito-Lay* and *Flame Coal* stand for the proposition that security costs can be awarded based on illegal strike activity, neither of these cases dispenses with the requirement that a causal link be established between the illegal activity and the claimed damages. The Court of Appeals' decision effectively eliminates the requisite causal link, however.

This decision is inconsistent with other circuits' requirements that causation be established before damages may be awarded. In *Feather*, the Third Circuit applied tort-law causation principles in awarding damages under the National

Labor Relations Act. Feather, 903 F.2d at 967. Where there are mixed causes, such as this cause where the record makes it clear that most, if not all, of the security costs were traceable to primary and not secondary activity, damages may only be awarded if the alleged misconduct "materially contributed" to the losses. *Id.* The Court of Appeals' decision, allowing recovery under section 8(b) without evidence of causation, exposes unions to untold damages based solely on the decision of the employer to incur costs. The Petition must be granted to establish that under section 8(b), damages may only be awarded if a party proves a causal link between the allegedly illegal activity and the costs incurred.

**Point 3:**

**The Petition should be granted to establish that ambulatory "picketing between the headlights" is protected primary strike activity and not a violation of section 8(b).**

The Petition should also be granted to re-establish a union's right to conduct ambulatory picketing of a primary strike target. The Court of Appeals affirmed the District Court's lost profit damages awards based on secondary activity even at sites where CalMat personnel were present at or near the time the picketing occurred, or Local 12 had other legitimate disputes with the alleged "secondary" employers. It has long been recognized that a union may follow employees who perform their duties away from the primary employer's premises and picket at their work locations. *See, e.g. Truck Drivers Local 728 (Brown Transport Corp.)*, 144 N.L.R.B. 590 (1963). The Court of Appeals' decision calls into question this principle of ambulatory picketing.

At the R-Help, Burhoe, and R & H Paving sites, which constituted a large percentage of the damages awarded for alleged secondary activity, lawful primary picketing occurred while CalMat and Industrial personnel were on site or soon to be on site. This type of ambulatory picketing of primary-employer personnel at off-site locations is known as "picketing between the headlights." Such conduct does not constitute unlawful secondary activity. *See Teamsters Local 807 (Schultz Refrigerated Service)*, 87 N.L.R.B. 502 (1949). The Court of Appeals' decision departs from this precedent by simply ignoring the presence of CalMat personnel during the referenced incidents.

The Court of Appeals' decision is not only a departure from precedent protecting a union's right to engage in ambulatory picketing, but it also creates a split among the circuit courts. With respect to the R-Help site, the Court of Appeals refused to accept the argument that Local 12 was engaged in legitimate primary picketing, asserting that this argument was without merit because "CalMat trucks and employees were absent." (App. *infra*, A51.) The record contains evidence that CalMat's trucks were scheduled to arrive at the R-help and did arrive. (R.E. 360-61).

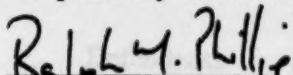
Other circuits have concluded that, contrary to the Court of Appeals' determination, the absence of the strike target's employees does not in and of itself mean that the picketing constitutes secondary activity. *See N.L.R.B. v. Carpenters Dist. Council*, 383 F.2d 89, 93 (8th Cir. 1967) (actual presence or absence of primary employer's employees is not critical to determining lawfulness of the activity). The Court of Appeals' departure from this line of cases presents a significant danger to unions' right to strike.

By its decision, the Court of Appeals has tied a union's ability to conduct off-site ambulatory picketing to the primary strike target's actions. If the struck employer's trucks are scheduled to arrive at a site and the union sends pickets, under the Court of Appeals' decision, the union would be engaging in unlawful secondary activity if the employer decides, for whatever reason, to delay the arrival of its trucks. As the Eighth Circuit observed in *Carpenters District Council*, the absence or presence of the primary employer's personnel should not be controlling on the issue of whether a union is engaged in legitimate ambulatory picketing. The Petition should be granted to establish the legitimacy of "picketing between the headlights" and prevent further usurpation of union rights under the new precedent set by the Court of Appeals.

## CONCLUSION

The questions presented in this Petition are important questions of law involving the National Labor Relations Act. If allowed to stand, the Court of Appeals' decision will create a split in authority among the circuits and raise the specter of crippling damages awards against other unions that, like Local 12, engaged in legitimate primary strike activity. This Court should exercise its supervisory powers over the lower courts and grant the Petition for a Writ of Certiorari.

Respectfully submitted,



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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| CALMAT CO., and INDUSTRIAL ASPHALT, a subsidiary of CalMat Co., Plaintiffs, | ) |
| v. | )No. CV 95-5504-WJR |
| INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12, Defendants. | )FINDINGS OF FACT )AND )CONCLUSIONS OF )LAW |

FINDINGS OF FACT

A. The Parties.

1. In 1995 CalMat was, and still is a company engaged in the business of producing, manufacturing and selling construction materials, including sand, crushed rock, ready-mix concrete, asphalt and related products.

2. CalMat has registered and presently operates its asphalt operations under the trade name "Industrial Asphalt."

3. When this action commenced in August 1995, Industrial-Asphalt was a partnership, whose corporate partners were wholly-owned subsidiaries of CalMat.

4. At all relevant times, CalMat was, and is an employer engaged in commerce within meaning of Sections 2 (2), (6), and (7) of the National Labor Relations Act. 29 U.S.C. § 152 92), (6), (7).

5. Until December 1995, Industrial Asphalt was an employer engaged in commerce within the meaning of Sections 2 (2), (6), and (7) of the National Labor Relations Act. 29 U.S.C. § 152 (2), (6), (7).

6. In December 1995, Industrial Asphalt was dissolved and all of its assets and liabilities, including its right to pursue this action against Local 12, were assigned to its two partners, two wholly-owned subsidiaries of

CalMat. In turn, these two wholly-owned subsidiaries were dissolved and all of their assets and liabilities, including their rights to pursue this action against Local 12, were assigned to CalMat. (Exh. 326).

7. Local 12 is a labor organization within the meaning of Section 2 (5) of the National Labor Relations Act. 29 U.S.C. § 152(5).

8. CalMat and Local 12 have been parties to collective bargaining agreements for many years.

9. At the time of the events giving rise to CalMat's claims, Local 12 was the exclusive bargaining representative of employees of CalMat and Industrial Asphalt, including (1) CalMat's rock, sand, and gravel plant employees; (2) Industrial Asphalt's plant employees; and (3)

Industrial Asphalt's employees who work on the asphalt installation crews.

10. The CalMat rock and sand plant unit and the unit of asphalt installation crews were each covered by a separate collective bargaining agreement. The agreement covering the latter unit was negotiated through the Associated General Contractors, Inc. ("AGC"), a mulit-employer association, from whom CalMat withdrew its bargaining authority.

11. The employees at the asphalt plants were covered by the Master Labor Agreement between Local 12 and the Permanent Asphalt Plant Employees Association. CalMat also withdrew its bargaining authority from this Association. Following CalMat's withdrawal of its bargaining authority, all other member-employers

withdrew their bargaining authority and the Association dissolved.

12. As of July 1, 1995, the collective bargaining agreements covering all of the foregoing units had expired.

13. On or about July 25, 1995, Local 12 struck CalMat and Industrial Asphalt throughout Southern California.

14. On August 17, 1995, CalMat and Industrial Asphalt filed and served Local 12 with its complaint for damages under Section 303 of the National Labor Relations Act, 29 U.S.C. § 187.

B. Local 12 Threatened and Coerced CalMat's Customers and Their Employees to Stop Purchasing or Handling CalMat's Materials, in Violation of Section 8(b) (4) (B).

15. Where the testimony of third parties and Local 12's business agents or officers were in conflict, the

Court found the testimony of third parties to be more credible for, inter alia, the following reasons:

(a) There was no evidence presented at trial that any third party had a motive to fabricate his testimony, whereas Local 12's business agents and officers would be so motivated to avoid liability and a contempt citation.

(b) Some of Local 12's business agents testified inconsistently with the testimony they gave at their deposition.

(c) Local 12's business agents and officers testified inconsistently with the testimony they gave at their deposition

(d) Some of the third-party witnesses testified of having experienced similar unlawful actions by Local 12's business agents. In contrast, there was no evidence presented at trial that any of these third parties were part

of a conspiracy to injure Local 12 by providing adverse testimony in this action.

16. Local 12's business agent, Bob Miles, visited Breckley Contracting's job site at Telephone Road where it was laying asphalt purchased from Industrial Asphalt. Miles told Al Breckley, the company's owner, that he was laying "struck material" and that if Breckley continued to do so, Miles would picket the job site and call the Local 12 members off the job. Miles then instructed the Local 12 members that they could not lay struck material, picketed the job site, and told Breckley to buy asphalt from Gillibrand if he wanted to continue working.

17. Jim Miller, an employee of Breckley Contracting, also witnessed an incident described in the foregoing paragraph. When Miller joined the conversation to challenge Miles' right to shut down

the job, Miles told Miller he would "kick the shit out of him."

18. Miles visited Breckley Contracting's job site at Patterson Road. In the presence of Jim Miller, Miles told the Local 12 members at the site to quit laying asphalt purchased from Industrial Asphalt because they were "in violation of strike," and that they would be fined $2,000 and could lose their pensions if they did not obey him.

19. Before Garcia Paving took delivery of asphalt from Industrial Asphalt at its Taft Federal Prison job, local 12 business agent, Jim Church, spoke to David Garcia, the owner of Garcia Paving, at the job site. Church informed Garcia of Local 12's strike against Industrial Asphalt in Los Angeles and told Garcia that there might be a strike at the job site as a result.

20. Church picketed Garcia Paving's job site at the Taft Federal Prison the day after the first delivery of asphalt by Industrial Asphalt. When Garcia asked

Church how to get the pickets removed, Church told him "go with a union outfit, Granite or Griffith, and your problems will be resolved."

21. Another of Local 12's business agents, Fred Williams, contacted Griffith Company about its ability to supply materials to Garcia Paving and the price it would charge for asphalt, and relayed the information to Garcia Paving. Garcia Paving then advised Williams it would buy from Griffith Company (Exh. 19). Immediately upon being told that, the pickets were removed from the job site.

22. Garcia Paving switched suppliers to Griffith Company for no reason other than the picketing by Local 12.

23. Garcia Paving purchased 8,103.6 tons of asphalt from Griffith Company, instead of Industrial Asphalt, resulting in lost profits to Industrial Asphalt of $24,866.03 (Exhs. 310, 314).

24. Local 12's business agent Kurt Glass told Wayne Silvia, of Silvia Construction, Inc., that is was a violation of the strike for his company to purchase materials from Industrial Asphalt, a "struck company." When Silvia told Glass he was still going to buy his asphalt from Industrial Asphalt, Glass responded, "Then you're going to have problems."

25. Local 12's business agent, Pat McGuire, told Mark Overgaauw, of Mission Readymix, a manufacturer of ready-mix concrete which purchases aggregate material used in making concrete from CalMat, that Local 12 would picket the jobs sites of Mission Ready-mix's customers unless Mission Ready-mix stopped purchasing aggregate materials from CalMat.

26. In August 1195, Miles told Howard Zerkel, the project manager for C.A. Rasmussen, Inc's project at the Arundell Dam, that he did not want

Rasmussen buying materials from CalMat during the strike and that he did not care where Rasmussen purchased its materials so long as it was not from CalMat. Thereafter, when Rasmussen received deliveries from CalMat, Miles returned to the jobs site, picketed, and told Zerkel the he "had problems" with the company buying from CalMat and that he would send home the Local 12 members.

27. As a result of Miles' conduct described in the foregoing paragraph, Rasmussen purchased aggregate materials from Gillibrand and Antelope Valley Aggregate, instead of CalMat.

28. When Zerkel's boss, Larry Rasmussen, questioned Local 12 business agent, Jerry Lanham, why Miles would not remove the pickets from Arundell Dam unless the company switched suppliers to Gillibrand, a non-union company, Lanhan said, "That's the way we are playing it this time."

29. R-Help, Inc. was the ready-mix concrete subcontractor to Rasmussen at the Arundell Dam, and CalMat supplied ready-mix concrete to R-Help at that project. At a time when no CalMat employees were at the job site, Miles visited the job site with a picket sign and told Roberto Hurtado, R-Help's owner, that he would not allow Local 12 members to enter the job site and lay concrete because of Local 12's strike against CalMat. Local 12 members did not go to work, and Miles told Hurtado that they would be allowed to work only if he switched to a supplier other than CalMat.

30. As a result of Miles' conduct, R-Help purchased 5,092 yards of ready-mix concrete from State Readymix, instead of CalMat, resulting in lost profits in the amount of $172,135.06 (Exhs. 242, 314).

31. Bob Sawyer was the project manager for Rasmussen at its Santa Ana River project to which

CalMat was supplying rip rap (large rocks). Local 12's business agents, Doug Clark and Fred Young, caused Local 12 members working at the site to cease working. When Sawyer asked Young whether his pulling the Local 12 members off the job was because Rasmussen was buying materials from CalMat, Young said that he "could not answer" the question.

32. The next day, following the incident described in paragraph 31 above, Clark returned to the job site and instructed Local 12 members, employed by Mossler, the subcontractor placing the rip-rap purchased from CalMat, to stop working. At that time, Clark told Sawyer that Mossler could return to work if Rasmussen purchased the rip rap from a source other than CalMat.

33. Dean Rasmussen, the President of C.A. Rasmussen, Inc., later asked Young why Local 12 was picketing at the Santa Ana River project. Young responded

that it was because Rasmussen was buying materials from CalMat, and that if Rasmussen would purchase materials from another source, there would be no further picketing. Young also told Rasmussen, "Dean, I'll deny it if anyone ever asks, but the problems you got is CalMat."

34. In late July 1995, at a Rasmussen job at Lambs Canyon/Highway 79, where CalMat was supplying asphalt to a subcontractor, Escudero Paving, Local 12's business agent, Bud McFarland, told Mike Aparicio, Rasmussen's project manager, that the Local 12 members working there could not install asphalt which crossed a picket line coming out of a plant, like CalMat and Industrial Asphalt, and that there would be pickets at the job site if Rasmussen and Escudero attempted to receive asphalt from Industrial Asphalt.

35. Within 30 minutes of McFarland's visit, Aparicio called Robert Escudero, because he was concerned

about delays which would result from picketing at the job site. Aparicio relayed his conversation with McFarland to Escudero and advised Escudero to start looking for another asphalt supplier.

36. Following the conversations described in paragraphs 34 and 35 above, Escudero did not attempt to take any further deliveries of asphalt from Industrial Asphalt and, instead, entered into a contract with Matich Corporation on August 9, 1995, to supply the remaining 122,283.6 tons of asphalt needed to complete the job. The information Escudero received from Aparicio was a substantial factor in his switching asphalt suppliers.

37. Industrial Asphalt's lost profits for the 122, 283.6 tons of asphalt Escudero purchased from Matich Corporation, instead of Industrial Asphalt, were $564,238.83 (Exh. 314).

38. One of Local 12's business agents visited Western Paving's job site at Oaks Avenue, Ontario, where

Western Paving was installing base material purchased from Industrial Asphalt. The business agent told Henry Alba that he was there to shut down the job.

39. When he learned of the events described in paragraph 38 above, Bill Millar, then a manager for Western Paving, called Local 12's office and spoked to Kurt Glass. When asked, Glass told Millar that the Oaks Avenue job had been shut down because there was a strike against CalMat and that Glass did not want Western Paving putting down CalMat's base.

40. David Noone, Vice President of Sales for Western Paving, had a telephone conversation with Glass during which Glass told Noone that Local 12 was watching construction projects where contractors where buying from Industrial Asphalt, and that there could be consequences for using Industrial Asphalt.

41. Based on the conversation described in an earlier paragraph, Noone changed suppliers from Industrial Asphalt to Owl Rock (aka "Robertson's"). Western Paving purchased 3,752.30 tons of asphalt from Owl Rock, instead of Industrial Asphalt, for its Puente Hills Landfill job, resulting in lost profits of $23,262.45 (Exhs. 306, 314).

42. Lanham visited Western Paving's job site at the Janss Mall and told Rigaberto Rodriquez and the other employees to stop working. Rodriquez relayed this event to David Noone.

43. Based on the facts described in paragraph 42 above, Noone changed suppliers for the Janss Mall job from Industrial Asphalt to Gillibrand. Western Paving purchased 809.5 tons of asphalt from Gillibrand, instead of Industrial Asphalt, resulting in lost profits to Industrial Asphalt in the amount of $6,556.87 (Exhs. 307, 314).

44. R & H Paving had a project at 5th and Gonzales Road, in the City of Oxnard, where the company was buying asphalt from Industrial Asphalt. Miles followed a truck of asphalt to the job site and picketed, because the company was receiving "hot stuff" (asphalt) from Industrial Asphalt.

45. While Miles was picketing the job site, an employee of R & H Paving, Tom Flannigan, asked Flannigan, asked Miles why he was picketing R & H Paving. Miles told Flannigan that it was a "sanctioned picket line."

46. Bob Leslie, the owner of R & H Paving, switched asphalt and ready-mix concrete suppliers on this and other jobs from Industrial Asphalt and CalMat when he learned that Local 12 picketed the job site, because the company had purchased asphalt from Industrial Asphalt.

47. For the jobs referenced in paragraphs 45 and 46 above, R & H Paving purchased 2,228.13 tons of

asphalt and 1,024 yards of ready-mix concrete from suppliers other than Industrial Asphalt and CalMat. The lost profits to Industrial Asphalt and CalMat for the lost sales are $48,341.80 (Exhs. 311, 312).

48. Local 12's business agent, Pat McGuire, arrived at a construction site of Radich Construction immediately following the arrival of a third-party trucking company which was hauling fill sand from CalMat to the job site. McGuire told Danny Martinez, Radich's foreman, that Local 12 would picket the job site if he unloaded the sand. Martinez instructed the driver to return the sand to CalMat because of McGuire's threats.

49. As a result of McGuire's statement, Radich Construction purchased fill sand from Fontana Trucking Co., instead of CalMat.

50. Nye & Nelson had an unfinished paving job at 5th Street and Ross Ave., in the City of Oxnard, which was idled by Nye & Nelson's defensive lockout of

its employees represented by Local 12. City of Oxnard officials approached Ruric Nye, the owner of Nye & Nelson, about completing a phase of the job because of safety concerns.

51. Following the conversation with Oxnard City officials, described in paragraph 50 above, Nye contacted Lanahn to inquire whether Local 12 would allow its members to work on the job. Lanham told Nye that the company could not use Local 12 members to pave the job if the company purchased asphalt from Industrial Asphalt but, if the company used Gillibrand, Nye could do the work with Local 12 members.

52. As a result of Nye's conversation with Lanham described above, Nye purchased 1,713.1 tons of asphalt from Gillibrand, instead of Industrial Asphalt, resulting in lost profits to Industrial Asphalt of $10,877.52 (Exhs. 305, 314).

53. Bruce Flatt, an estimator employed by Excel Paving, was responsible for securing an asphalt supplier for a substantial job for the City of Carson. To supply this job, Flatt initially placed a purchase order with Industrial Asphalt (Exh. 165). Thereafter, Flatt learned of the problems numerous other contractors were having with Local 12 as a result of buying materials from CalMat or Industrial Asphalt. Because Flatt was concerned that Excel Paving may have a similar experience at the City of Carson job, Flatt changed asphalt suppliers to Al American Asphalt, which sold Excel Paving 26,758.3 tons of asphalt to complete the job (Exh. 246).

54. Because Excel Paving did not purchase (from Industrial Asphalt) the 26,758.3 tons of asphalt for the City of Carson job, Industrial Asphalt lost profits in the amount $141,592.77 (Exh. 224).

55. In September 1995, Excel Paving sent a letter to Local 12, stating that it was their position that it was unlawful for Local 12 to picket projects, because Local 12 had a strike against a company supplying material to such projects. Local 12 did not respond to this letter to assure Excel Paving that it would not be subjected to secondary boycott activity (Exh. 224).

56. In addition to the City of Carson job, Excel Paving purchased at least 30,000 tons of asphalt from a supplier other than Industrial Asphalt for the reasons set forth above. As a result, Industrial Asphalt lost profits in the amount of $158,746.66 (Exh. 314).

57. Berry General Engineering had a paving job at California and Main Street, in the City of Ventura, to which Industrial Asphalt was supplying rubberized asphalt, a type of asphalt few companies manufacture. Miles told Dan Berry, the company's

owner, that he would pull the Local 12 members off the job is the company purchased asphalt from Industrial Asphalt.

58. Because there were no other sources of rubberized asphalt available to Berry, Berry spoke to Miles about buying rubberized asphalt from Industrial Asphalt to avoid a possible fine of $100,000 for construction delay. After consulting with Lanham and his obtaining approval, Miles told Berry the he could buy the rubberized asphalt from Industrial Asphalt.

59. Although Local 12 permitted Berry to buy the rubberized asphalt for the job at California and Main Street from Industrial Asphalt, Berry was required to buy ready-mix concrete for the job from State Readymix, instead of CalMat.

60. Because of Miles' threat to Berry, set forth above, Berry purchased 919.5 tons of asphalt from Gillibrand, instead of Industrial Asphalt, for a

second job, i.e., the Santa Paul School District job. Industrial Asphalt's lost profits were $7,446.17 (Exhs. 308, 314).

61. In about August 1995, Tim Burhoe, a management employee of D.W. Burhoe Construction, Inc., received a telephone call from Lanham. Lanham told Burhoe that the company "cannot" buy from CalMat and recommended that the company buy ready-mix concrete from Conejo Readymix instead.

62. As a result of Lanham's statements to Burhoe, the company purchased 343.5 yards of ready-mix concrete from Conejo Readymix, instead of CalMat. CalMat's lost profits were $10,161.45 (Exhs. 309, 314).

63. Miles followed a third-party truck hauling asphalt from CalMat's plant to a customer's job site at a church in Ventura. Miles then picketed the job site.

C. CalMat Incurred Subtantial Expense to Hire Security to Protect Against Local 12's Secondary Boycott.

64. In this action, CalMat seeks recovery of $1,417,054 for security expenses provided by Personnel Support Systems, Inc., ("PSS) from approximately July 17, 1995 to November 22, 1995, as a result of Local 12's unlawful activity of Local 12 (Exhs. 1143).

65. CalMat employed PSS primarily because CalMat was concerned about the harassment of its customers as its plant sites and customer job sites, as well as concerns over the personnel safety of its employees and its customers and the protection of its assets.

66. CalMat's concerns were based on the history of its relationship with Local 12, Local 12's reputation in the industry to engage in unlawful conduct, and the Owl Rock Products' lawsuit against Local 12, which involved similar secondary boycott activity and extreme violence at picket lines.

67. CalMat would not have hired PSS absent its concerns about customer harassment at plant and jobs sites and, instead, would have hired more affordable local firms to provide security.

68. From approximately July 17, 1995, through November 22, 1995, CalMat employed PSS to provide security services, including (1) the Response Team to respond to customer complaints, reports of Local 12 business agents following trucks to jobs sites, and "flare ups" at the CalMat plants which Local 12 picketed; (2) the Communication Center which coordinated the activities of the Response Team and dispatched other security personnel; and (3) additional security personnel at various plants to ensure that customers were able to enter and exit CalMat's plants easily and free of harassment.

69. The costs of the additional security measures were $1,417,054 (Exh. 1143).

70. CalMat did not reduce the staffing levels of PSS personnel earlier and did not terminate the use of their services before November 1995, because of its continuing concern for, and report of problems experienced by, its customers.

D. Local 12 Solicited Employers to Sign the Letter of Understanding, in Violation of Section 8 (b) (4) (A).

71. Local 12 entered into the Interim Agreement with at least 103 employers (Exhs. 26-45, 52-54, 71-148, 1001, 1017).

72. Fourteen (14) of the Interim Agreements have the paragraph, incorporating the Letter of Understanding crossed out (Exhs. 27, 54, 87, 115, 121, 129, 131, 135, 13 7 140, 142-43, 145-46.)

73. The remaining 89 Interim Agreements incorporate the Letter of Understanding by reference.

74. Local 12 produced nineteen (19) Letters of Understanding signed by employers (Exhs. 28, 52-53, 71-75, 77-79, 82, 84-86, 89, 92, 134, 138).

75. Miles told Lou Marietta, Sr., the owner of Tri-Country Truck Company, that the company had to sign an Interim Agreement to its skip-loader operator (who was represented by Local 12) could continue to work.

76. When Marietta and his son, Lou Marietta, Jr., went to Local 12's office, Miles required them to sign the Interim Agreement and the Letter of Understanding. Miles refused to allow Marietta and his son to have a copy of the Letter of Understanding, after signing it.

77. To avoid continued picketing at its project, Dean Rasmussen, President of C.A. Rasmussen, Inc., met with Local 12 business agent Bob Burns and Local 12's office to sign an Interim Agreement.

78. In addition to presenting Rasmussen with the Interim Agreement, Burns also presented the Letter of Understanding to Rasmussen to sign. When Rasmussen objected to the Letter of Understanding

and told Burns that he did not want to sign it, Burns said that there was nothing he [Burns] could do about it and that Rasmussen had to sign it to get the picketing stopped.

79. Burns refused to provide a copy of the Letter of Understanding to Rasmussen after he signed it.

E. Local 12's Strike Against CalMat to Require It to Rejoin the AGC Violated Section 8 (b) (4) (A).

80. CalMat's previous collective bargaining agreement with Local 12, covering its employees who perform asphalt installation (former employees of Industrial Asphalt), was negotiated through the Associated General Contractors, Inc. ("AGC"), a multi-employer association to which CalMat belonged.

81. Prior to Local 12's strike, CalMat withdrew its bargaining authority from the AGC and notified Local 12 of its intent to negotiate separately for a collective bargaining agreement covering its asphalt installation employees.

82. Local 12's Business Manager, William Waggoner, expressed his objection to CalMat's withdrawal from AGC to CalMat's Vice President of Human Resources, Mason Dickerson, during the course of negotiations.

83. CalMat also withdrew its bargaining authority from the Permanent Asphalt Plant Employers Association, which had negotiated the previous collective bargaining agreement covering asphalt plant employees.

84. After CalMat withdrew its bargaining authority from the Permanent Asphalt Plant Employers Association, all other employers who belonged to the Associate withdraw their bargaining authority from the Association.

85. The members of Local 12 who struck CalMat included CalMat's emloyees who perform asphalt installation.

86. Local 12's strike against CalMat with respect to the employees who perform asphalt installation ended when CalMat rejoined the AGC.

F. CalMat's Claims for Intentional and Negligent Spoliation of Evidence.

87. Local 12 did not produce any documents evidencing its "policy" to destroy its Business Representatives' Weekly Reports every six months.

88. None of the business agents or officers of Local 12 could identify the source of the policy or when it originated, and they could only explain that they knew that it was the policy.

89. Local 12 has been (continuously) under an injunction since 1983 restraining it from engaging in unlawful secondary boycott activity (Exh. 1317).

90. On August 2, 1995, CalMat advised Local 12, by letter, of unlawful secondary boycott activity by its business agent, Jim Church (Exh. 178).

91. On August 8, 1995, CalMat advised Local 12 of additional information concerning Local 12's unlawful activities. CalMat advised Local 12 that it intended to file a lawsuit to recover damages. (Exh. 239).

92. On August 17, 1995, CalMat filed the instant lawsuit alleging that Local 12 had engaged in unlawful secondary boycott activity, in violation of Section 8 (b) (4).

93. On August 17, 1995, CalMat served Local 12 with its Complaint.

94. After August 17, 1995, Local 12 was unable to provide reports from approximately July 1995, through June 1996 (Exh. 219, 327).

95. CalMat served Local 12 with its First Request for Production of Documents on December 8, 1995 (Exh. 317).

96. The Business Representatives' Weekly Reports were responsive to Request Nos. 4, 8, 30 and 31 in

CalMat's First Request for Production of Documents. (Exh. 317).

97. Local 12's Business Representatives' Weekly Reports were not identified or produced in response to CalMat's First Request for Production of Documents (Exhs. 317, 327).

98. With one exception, the only Business Representatives' Weekly Reports produced by Local 12 are dated July 1996, or later.

99. Neither Church nor Williams was able to explain how this Report was located in November 1996 - more than 14 months after it was completed -and how is survived Locas 12's "six month destruction policy."

100. The only Business Representatives' Weekly Report for the time period covering July through December 1995, produced by Local 12, is the Report prepared by Fred Williams, who reports to Jim Church, dated August 11, 1995, which states:

August 11 95 - Bob Schefeld about Garcia Paving

Talked to Griffith Co about price of asphalt

Talked to Garcia going to buy from Griffith

(Exhs. 19, 219).

## CONCLUSIONS OF LAW

A. Local 12 Violated Section 8 (b) (4) (B) When it Threatened CalMat's Customers and Their Employees to Stop Purchasing or Handling CalMat's Materials.

1. The primary purpose Section 8 (b) (4)'s prohibition of secondary boycott activity is to avoid enmeshing neutral employers in other employers' labor disputes. National Labor Relations Board v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 71 S.Ct. 943 (1951); Schrader v. Sheet Metal Workers Local 30, 656 F. Supp. 1487 (N.D. Ind.

1987); Plumbers Local 274, 267 NLRB 1111 (1983).

2. It was unlawful under Section 8 (b) (4) for Local 12 to nave engaged in, or to have induced or encouraged any individual to engage in, a strike or refusal in the course of his employment to use, transport, or otherwise handle or work on any materials of CalMat in order to force or require any person to cease using, handling, transporting, or otherwise dealing in the products of CalMat 29 U.S.C. § 158 (b) (4) (i) (B).

3. It was unlawful under Section 8(b)(4) for Local 12 to have threatened, coerced, or restrained any person engaged in commerce in order to force or require any person to cease using, handling, transporting, or otherwise dealing in CalMat's products. 29 U.S.C. § 158 (b) (4) (ii) (B).

4. Local 12 had a duty to mitigate the secondary effects of its strike against CalMat. Hensel Phelps,

284 NLRB 246, 248 (1987); Plumbers Local 274, 257 NLRB 1111 (1983); Athejen Corp. 260 NLRB 1311 (1982).

5. By engaging in the conduct described in Findings of Fact Nos. 16, 23, 26-34, 39-40, 43-44, 45-48 and 65, supra, Local 12 violated Section 8 (b) (4) (i) (B), 29 U.S.C. § 158 (b) (i) (B). See Dehue Coal, 275 NLRB, 715, 721 (1985); Plumbers & Steamfitters Local 342, 225 NLRB 1364, 1367 (1976); Plumbers Local 274, 267 NLRB 1111, 1114 (1983); United Brotherhood of Carpenters and Joiners of America, Local Union 751, AFL-CIO v. Paul J. Ortega and Melvin T. Azeveda, dba Imperial Cabinet Shop, 204 NLRB 1102 (1973); Malek Construction Co, 244 NLRB 890, 896 (1979); Hensel Phelps, 284 NLRB 246, 248 (1987); Plumbers, Local 274, 267 NLRB 1111, 1114 (1983); Athejen Corp., 260 NLRB 1311, 1319 (1982).

6. By engaging in the conduct described in Findings of Fact Nos. 16-30, 34-41, 48, and 50-63, supra, Local 12 violated Section 8 (b) (4) (ii) (B), 29 U.S.C. § 158 (b) (4) (ii) (B). Peckham Materials Corp. 307 NLRB 612, 614, 617 (1992); Scales Air Compressor Corp., 200 NLRB 575, 579 (1972).

7. By engaging in the conduct described in Findings of fact Nos. 16-63, supra Local 12 breached its duty to mitigate the secondary effects of its strike against CalMat. Hensel Phelps, 284 NLRB 246, 248 (1987).

8. CalMat's damages are properly calculated as gross lost sales, less variable costs to produce the materials for the lost sales. See Vitex Manufacturing Corp. v. Caribtex Corp., 377 F.2d 795, 798 (3rd Cir. 1967); Buono Sales, Inc. v. Chrylser Motor Corp., 449 F.2d 715, 720 (3rd Cir. 1971).

9. The conduct described in Findings of Fact Nos. 16-63, supra, was a material cause of CalMat's lost profits of $1,168,246.61. Mead v. Retail Clerks Intern. Assoc. Local 839, 523 F.2d 1371 (9th Cir. 1975); Maxey v. Butchers' Union Local No. 126, 637 F.2d 912, 915 (9th Cir. 1980); Abreen Corp. v. Laborers' Intern. Union, 709 F.2d 748, 759(1st Cir. 1983); Kerry Coal Co. v. United Mine Workers of America, 637 F.2d 957, 966 (3rd Cir. 1981).

10. CalMat is entitled to recover its incremental costs to employ security to minimize the adverse effects of Local 12's unlawful secondary boycott. Mead, supra, 523 F.2d at 1365, n.11; Cranshaw Construction of New England v. Intern Asn'n. of Bridge Structural and Ornamental Ironworkers Local No. 7, 891 F. Supp. 656, 671 (D. Mass. 1995).

11. Local 12's unlawful secondary boycott activity, described in Findings of Fact Nos. 16-63, was a

material cause of CalMat's decision to employ Personnel Support Systems, Inc.("PSS"), and to retain PSS through mid-November, 1995. Mead, supra, 523 F. 2d at 1371.

12. Local 12's unlawful secondary boycott activity, described in Findings of Fact Nos. 16-63, was a material reason for CalMat to pay $227,179 for PSS to provide the Response Team from about July 31, 1995, through November 22, 1995. Mead, supra. 523 F.2d at 1371.

13. Local 12's unlawful secondary boycott activity, described in the Findings of Fact, Nos. 16-63, was a material reason for CalMat to pay $209,888 for PSS to establish and operate the Support Team from approximately July 31, 1995, through November 22, 1995.

14. Local 12's unlawful secondary boycott activity, described in Findings of Fact No. 16-63, was a material reason for CalMat to pay $980,787 to

substantially increase the level of its security plants from late July 1995 through mid-November 1995.

15. CalMat is thus entitled to the sum of $1,417,854.00 for security costs.

16. CalMat is entitled to recover its costs of suit herein. 29 U.S.C. § 187 (b).

B. Local 12's Strike Against CalMat to Require it to Rejoin the AGC Violated Section 8 (b) (4) (A).

17. It was unlawful for local 12 to strike CalMat if a purpose of the strike was to force CalMat to join a multi-employer association, including the Associated General Contractors, Inc. ("AGC"). 29 U.S.C. § 158 (b) (4) (i) (A).

18. The Findings of Fact No. 80-86, supra, establish that Local 12's strike against CalMat, until at least December 1995, violated Section 8 (b) (4) (i) (A), 29 U.S.C. § 158 (b) (4) (i) (A), because it was intended, in part, to cause CalMat to rejoin the AGC. Frito Lay, Inc. v. Local Union No. 137

Intern. Brotherhood of Teamsters, Chaffers, Warehousemen and Helpers of American, 623 F.2d 1354 (9th Cir. 1980).

19. CalMat's right to recover damages caused by Local 12's unlawfully motivated strike is separate and independent from its right to recover its damages for Local 12's unlawful secondary boycott of its customers. 29 U.S.C. § 158 (b) (4), 187 (b).

20. Because of Local 12's strike being unlawful under Section 8 (b) (4) (i) (A) though at least December 1995, CalMat is entitled to recover its damages, including its lost profits of $1,168,246.61, and its security costs of $1,417,054. 29 U.S.C. § 187 (b); Frito Lay, supra, 623 F.2d 1354.

C. Local 12's Willful Destruction of Its Business Representatives' Weekly Reports Was Not Unlawful.

21. The elements of CalMat's claim for intentional spoliation of evidence are (1) the existence of pending or probable litigation; (2) the destruction of

evidence; (3) Local 12's knowledge that litigation was pending or probable; (4) Local 12's "intent" to interfere with CalMat's ability to prove its claims; and (5) Calmat's diminished ability to prove damages. Willard v. Caterpillar, Inc., 40 Cal. App. 4th 892, 48 Cal. Rptr. 2d 607, 618 (1995).

22. The intent element of a claim for intentional spoliation of evidence is not satisfied in this case.

D. CalMat Is Not Entitled to Punitive Damages

23. Under Cal. Civ. Code § 3294(a) punitive damages may be awarded only "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud of malice."

24. CalMat is unable to meet this standard of proof.

E. CalMat is Not Entitled to Prejudgment Interest

25. An award of prejudgment interest is improper in cases where the statute itself already provides a remedy for violations of Section 8 (b) (4) (A) or (B) of the Act.

IT IS SO ORDERED this 9th day of April, 1998

WILLIAM J. REA
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

| | |
|---|---|
| CALMAT CO, and INDUSTRIAL ASPHALT, a subsidiary of CalMat Co. Plaintiffs, | )CASE NO. CV 95-5504-WJR (Ctx) |
| vs. | )JUDGEMENT IN A CIVIL CASE |
| INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12, Defendant. | ) |

After trial to the Court, the Honorable William J. Rea, District Judge, presiding, and the matter having been duly heard and considered, and Findings of Fact and Conclusions of Law having been duly rendered,

IT IS ORDERED AND ADJUDGED:

1. That judgment is granted to Plaintiffs CalMat Co and Industrial Asphalt on their first Amended Complaint in the amount of $2,585,300.61 and against Defendant International Union of Operating Engineers Local Union No. 12.

2. Plaintiffs CalMat Co and Industrial Asphalt shall

recover their costs of suit pursuant to 29 U.S.C. Section 197 (b) and Local Civil Rule 16 of the United States District Court, Central District of California.

Dated: April 24, 1998

THE HONORABLE WILLIAM S. REA

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CALMAT CO AND INDUSTRIAL ASPHALT

United States Court of Appeals, Ninth Circuit.

CALMAT CO. and Industrial Asphalt, a subsidiary of CalMat Co. Plaintiffs-Appellees,

v.

LOCAL 12, INTERNATIONAL UNION OF OPERATING ENGINEERS, Defendant-Appellant.

No. 98-56037.
D.C. No. CV-95-05504-WJR(CTx).

Argued and Submitted Dec. 7, 1999.
Decided Feb. 24, 2000

Appeal from the United States District Court for the Central District of California, William J. Rea, District Judge, Presiding.

Before D.W. NELSON, BEEZER, and T.G. NELSON, Circuit Judges.

MEMORANDUM

Local 12 of the International Union of Operating Engineers ("Local 12") appeals the distrcit court's judgment in favor of CalMat and Industrial Asphalt (collectively "CalMat") finding Local 12 liable for its use of unlawful labor practices udner Section 8(b)(4) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 1589 (b)(4). The district court awarded Industrial $2,585,301 in lost profits and security expenses. We have jurisdiction under § 1291, and we affirm on all issues.

The record supports the conclusion that Local 12's strikes were motivated, at least in significant part, to cause CalMat to rejoin the Associated General Contractors ("AGC"). Given the temporal proximity of CalMat's rejoining the AGC to the end of the strike and testimony establishing Local 12's displeasure with CalMat's decision due to the effect it had on the Permanent Asphalt Plant Employers

Association, we affirm the district court's findings under Frito-Lay, Inc v. Local Union No. 137, 623 F.2d 1354, 1360 (9th Cir. 1980).

The district court's factual findings and conclusions of law establishing that Local 12 unlawfully threatened and coerced CalMat's customers and their employees to cease purchasing or handling its products are similarly correct. "The secondary boycott provisions in § 8(b)(4)(B) prohibit a union from inducing employees to refuse to handle goods with the object of forcing any person to cease doing business with any other person." International Longshoreman Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 222 (1982). Typically, "[s]econdary boycott activities are those which are calculated to involve neutral employers and employees in the union's dispute with the primary employer." Iron Workers Dist. Council v. NLRB, 913 F.2d 1470, 1475 (9th Cir. 1990). We are required to view the totality of circumstances. See Constar, Inc v. Plumbers Local 447, 748 F.2d 520, 522 (9th Cir. 1984). "[T]hat section requires a showing of threats, coercion, or restraints." Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 578 (1988).

After a through review of the record, there is sufficient evidence to support each of the district court's findings with respect to Excel Paving, Escudero-Lamb Canyon, R-Help (Arundell Dam site), Western Paving (Janss Mall and Puente Hills sites), Nye & Nelson (5th and Rose site); and the Berry, Burhoe, Garcia and R& H Paving sites. Indeed the record before us establishes numerous examples of unlawful practices under Section 8, including, but not limited to, instances where Local 12 representatives: (1) threatened to unlawfully picket or prevent Local 12 members from performing work at sites that purchased or planned to purchase Industrial's materials; (2) directed their members to cease performing work at sites that purchased materials from Industrial; (3) removed pickets from sites that switched suppliers; (4) engaged in unlawful picketing at sites that received Industrial's materials, (5) expressly told individuals that they "could not" purchase from CalMat, and (6)

otherwise unlawfully induced an entity to change suppliers out of fear of picketing.

Local 12 has been unable to demonstrate a single erroneous finding of fact or conclusion of law derived from the evidence offered at trial. Instead, Local 12 offers us various arguments that focus on alleged discovery violations and inadmissibility, and attempts to use the existence of primary picketing to mitigate the significance of its representatives' actions. We find Local 12's contentions to be meritless, particularly in light of documentation demonstrating that various entities, namely Rasmussen, Escudero, Western Paving, and R & H Paving were disclosed to Local 12 either before the close of discovery or prior to trial. Where necessary, the court did take mitigating steps by limiting the use of certain documents based on the plaintiff's failure to disclose them to defendant. Moreover, there is sufficient evidence to support the court's findings on hearsay with respect to the objected evidence. See United States v. Kirk, 844 F.2d 660, 663 (9th Cir. 1988) (statement admissible where not offered for truth of matter asserted, but to establish statement was made or effect on bearer); United States v. Amahia, 825 F.2d 177, 181 (8th Cir. 1987) (upholding district court's admission of testimony where used to demonstrate actions taken as a result of the conversation, rather than to show the truth of the matter asserted).

Given that the record before us reflected evidence of direct threats, coercion, prevention of work, and other examples of secondary unlawful activity with respect to each of the challenged entities, we further disagree with Local 12's attempted characterizations in support of primary picketing. For example, with respect to R-Help, Local 12 picketed the site even though CalMat trucks and employees were absent. Picketing of this nature has been found to violate the provisions of Section 8(b)(4)(i) and (ii)(B) of the Act. See Service Employee's Int'l Union, 271 N.L.R.B. 750, 752 (984); Laborers Local 135, 300 N.L.R.B. 920, 925 (1990). By using the word "coerce," Congress "did not intend to proscribe only strikes or picketing, but intended to reach any form of economic pressure of

a compelling or restraining nature." Associated Gen. Contractors of Calif., Inc. v. NLRB, 514 F.2d 433, 438 (9th Cir. 1975). Accordingly, by engaging in the above conduct. Local 12 violated Section 8(b)(4)(i)(B) and (ii)(B) of the NLRA. See 29 U.S.C.§ 158(b)(4)(i)(B) and (ii)(B); Mine Workers District 17, 275 N.L.R.B. 715, 721 (1985), and Local 456, Int'l Bhd. of Teamsters, 307 N.L.R.B. 612, 614, 617 (1992).

Under Mead v. Retail Clerks International Association, 523 F.2d 1372 (9th Cir. 1975), a business that is the victim of unlawful union activity can recover damages for lost profits. Such damages should be calculated under "a relatively relaxed standard of proof, allowing recovery on evidence supporting a just and reasonable inference, more likely true than not, that the employer was damaged because of picketing or other union pressure." Id. at 1379 (internal quotation marks and citation omitted), Maxey v. Butches' Union Local 126, 627 F.2d 912, 915 (9th Cir. 1980). Having reviewed the record, we agree with the district court in finding that each of these unlawful activities materially--and substantially--contributed to the loss suffered by Industrial Asphalt. See Mead, 523 F.2d at 1376. As such, the district court correctly imposed liability on the part of Local 12 for each of the lost profits that Industrial encountered.

We hold that the award and amount of security costs afforded to Industrial under Frito-Lay, 623 F.2d at 1365 n. 11-is proper. See Flame Coal v. United Mine Workers, 303 F.2d 39, 46 (6th Cir. 1962). The award is justified by the number of sites affected by the unlawful secondary activity, the type of assistance required, and the duration of time over which the incidents occurred. The amount of the award is proper for the same reasons, and Local 12's arguments fail to demonstrate that the court made an erroneous calculation. We hold that the evidence support the court's findings, given the soundness of its conclusions and the reasonableness of its method of calculation. See Frito Lay, 623 F.2d at 1364 ([W]e will not review on appeal the merits of various methods of calculation, so long as the method actually employed by the district court is designed to yield a reasonable approximation of damages.").

Applying this principle, therefore, we find that the district court did not wrongfully award the calculated amount.

**AFFIRMED.**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|---|
| CALMAT CO,; INDUSTRIAL ASPHALT, a subsidiary of CalMat Co., Plaintiffs-Appellees | ) | NO. 98-56037 |
| | ) | D.C. No. CV-95-05504WJR |
| | ) | ORDER |
| v. | ) | |
| LOCAL 12, INTERNATIONAL OF OPERATING ENGINEERS) Defendant-Appellant. | ) | |

Before: D.W. NELSON, BEEZER and T.G. NELSON, Circuite Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judge T.G. Nelson voted to deny the petition for rehearing en banc, and Judges D.W. Nelson and Beezer so recommend.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc.

(Fed. R. App. P. 35.)

The petition for rehearing, and the petition for rehearing en banc are DENIED.

FILED

APR 14, 2000